No. 77-896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NORTHBROOK TRUST AND SAVINGS BANK,
Trustee under Trust No. LT-652,
Plaintiff,

vs.

COUNTY OF COOK, a body politic and corporate,
Defendant,

and

THE VILLAGE OF NORTHBROOK, a municipal corporation,
Intervenor-Petitioner,

and

THE VILLAGE OF GLENVIEW, a municipal corporation,
Intervenor-Petitioner,

and

LA SALCEDA HOMEOWNERS ASSOCIATION, INC.,
an Illinois not-for-profit corporation,
Intervenor-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT

Petitioners, the Village of Northbrook, the Village of Glenview, and the La Salceda Homeowners Association, pray that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois for the First District entered on April 7, 1977.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois for the First District is reported at 47 Ill.App.3d 879, 365 N.E.2d 433 (1977) and is set out in Appendix A to this Petition (p. 1a). Petitioners' petition for rehearing which was denied by the Appellate Court and the order of the Illinois Supreme Court denying Petitioners' petition for leave to appeal are reprinted in Appendices B and C respectively (pp. 19a-20a). The trial court opinion of the Circuit Court of Cook County is unreported and is printed in Appendix D to this Petition (p. 21a).

JURISDICTION

The judgment of the Appellate Court of Illinois for the First District was entered on April 7, 1977, and Petitioners' petition for rehearing was denied on May 5, 1977. Petitioners' petition for leave to appeal was denied by the Illinois Supreme Court on September 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

The sole question presented for review is whether the Petitioners have been denied due process and equal protection of the law by a state court decision which erroneously applies the state doctrine of mootness in zoning matters so as to make it impossible for Petitioners to obtain a full and fair hearing of their challenge to the Plaintiff's proposed development under the terms of the applicable county zoning ordinance.

CONSTITUTIONAL PROVISIONS INVOLVED

The First, Fifth and Fourteenth Amendments to the United States Constitution, set forth in Appendix E (p. 26a).

STATEMENT OF THE CASE

Although this action began in the state courts of Illinois as a zoning lawsuit, this petition does not present any of the substantive zoning issues which originally prompted the litigation. Rather, the issues here presented for review all involve the basic question of Petitioners' right to obtain a full and fair hearing in the state courts of Illinois as guaranteed by the United States Constitution.

This case originally involved the zoning regulations of Cook County, Illinois, as applied to a 17.9 acre parcel of land owned by the Plaintiff and located in unincorporated Cook County. The land is contiguous to the corporate limits of the Petitioner Village of Northbrook and abuts a low density residential development within the Village. The Plaintiff applied to Cook County for a rezoning of the property, classified as residential, to permit development of a large subregional K-Mart shopping center on the easterly 14.7 acres and a 31-unit multi-family development on the westerly 3.2 acres. Plaintiff's application was refused by the Cook County Board, and Plaintiff filed suit in the Circuit Court of Cook County challenging that denial. Because of its obvious interest in the matter due to the proximity of the proposed development to its boundary, the Petitioner Village of Northbrook was granted leave to intervene as a defendant in the case, a common and accepted practice under Illinois zoning law. Furthermore, leave to intervene as defendants was also granted to the Petitioners Village of Glenview, another nearby municipality, and the La Salceda Homeowners Association, which is a group of Northbrook homeowners with property abutting the proposed development.

On July 16, 1975, the trial court entered judgment holding invalid the residential zoning classification of the subject property and ordering the County to permit construction of the K-Mart shopping center and the 31-unit multi-family development. The Defendant Cook County and the Intervenors (Petitioners herein) immediately appealed that decision.

Subsequent to the judgment of the trial court, but prior to any action by the Appellate Court, the Cook County Board of Commissioners on January 19, 1976, adopted a comprehensive amendment to the Cook County Zoning Ordinance which effected a rezoning of much property in the County and changed the classification of the subject property from residential to commercial and multi-family residential, thus apparently permitting Plaintiff's proposed development. On January 28, 1976, the Village of Northbrook (Petitioner herein) filed a separate complaint in the Circuit Court of Cook County against the County of Cook contesting the validity of the comprehensive amendment insofar as it purportedly reclassified the subject property to permit Plaintiff's proposed development and a number of other commercial uses. The Village of Northbrook was soon thereafter joined in that action by the La Salceda Homeowners Association and the Village of Glenview, also Petitioners herein.

In view of the new classification of the subject property, the *Plaintiff*, on April 8, 1976, moved the Appellate Court to dismiss the pending appeal on the ground that issues raised therein had been rendered moot. Plaintiff's suggestions in support of its motion to dismiss are reproduced as Appendix F to this Petition (p. 27a). Because Northbrook's suit against the County was pending and dismissal of the appeal could be

construed as being *res judicata* as applied to that pending action challenging the new County ordinance, the Petitioners filed an objection to this motion to dismiss, accompanied by a cross-motion to reverse the judgment below and remand with instructions to dismiss the complaint. Petitioners' memorandum in support of their objections and cross-motion is reproduced as Appendix G to this Petition (p. 30a). Defendant County of Cook on May 3, 1976, filed objections to both Plaintiff's motion to dismiss and Petitioners' cross-motion to reverse and remand, contending that while the new classification did permit commercial development on the subject property, it did not allow a large subregional shopping center as proposed by the Plaintiff. Defendant Cook County's objections are reproduced as Appendix H to this Petition (p. 37a). These motions were not decided by the Appellate Court, but were instead taken with the case for decision. At oral argument before the Appellate Court, the Plaintiff altered its position and urged the Appellate Court to decide the controversy under the terms of the old zoning ordinance even though it had been superseded upon adoption of the comprehensive amendment. The Appellate Court acceded to the Plaintiff's wishes and determined the case on the basis of the repealed zoning classifications, affirming the findings and judgment of the trial court.

The Appellate Court thus committed serious error denying the Petitioners their constitutional right to a full and fair hearing on their challenge, still pending in the Circuit Court, to the Plaintiff's proposed development under the terms of the applicable County zoning ordinance.

REASONS FOR GRANTING THE WRIT

I.

THE ILLINOIS APPELLATE COURT ERRONEOUSLY DECIDED THIS ZONING DISPUTE UNDER THE TERMS OF THE REPEALED COUNTY ZONING ORDINANCE, THEREBY PREJUDICING PETITIONERS' CONSTITUTIONAL RIGHTS TO A FULL AND FAIR HEARING ON THE VALIDITY OF THE NEW ZONING ORDINANCE AS APPLIED TO THE SUBJECT PROPERTY.

In its opinion, the Appellate Court made clear it recognized that the zoning ordinance in effect at the time the trial court rendered its opinion had been superseded by a new ordinance which changed the classification of the subject property. The Appellate Court proceeded, however, to ignore one of the most elementary principles of zoning law, and of the general law governing appellate review, that a zoning controversy must be decided in accordance with the provisions of the ordinance in existence at the time the Appellate Court renders its decision and not in accordance with the provisions of the ordinance applicable at the time the suit was filed, and entered judgment based upon the old ordinance:

> Even though this court may take judicial notice of the fact that the subject property now has been reclassified to the C-4 general commercial district, by Cook County, after reviewing the record we conclude that the presumption of validity of the previous zoning ordinance has been overcome by clear and convincing evidence. (Appendix 12a).

This approach is not only in conflict with the teachings of numerous recognized zoning authorities, but directly contradicts previous decisions of courts in

every jurisdiction. For example, in his treatise on zoning, Anderson states the general rule:

> In proceedings to review a decision of a board of adjustment, the reviewing court, in most jurisdictions, will apply the law as it exists at the moment of review. If a zoning ordinance has been amended between the moment of administrative action or decision and the moment of review, the amendment will apply. Thus, where a restrictive amendment was adopted after the application for a permit, the reviewing court will judge the administrative decision on the basis of the amendment. 4 Anderson, *American Law of Zoning*, § 25.31 (2d Ed. 1976).

Similarly, the Illinois courts have uniformly held that the reviewing court must apply the zoning ordinance as it exists at the time of review.* In *Ward v. Village of Elmwood Park*, 8 Ill.App.2d 37, 130 N.E.2d 287 (1955), the plaintiffs sought a declaration that the zoning ordinance of the village was invalid as applied to their property. After suit was filed, a new ordinance was adopted and pleaded by the village, but the trial court held it had no application to the pending suit, refused to consider it, and ruled for the plaintiff. Under such circumstances the Appellate Court held the judgment below should be reversed and the case remanded to the trial court for further proceedings:

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* Some Illinois courts have stated that where an amendment is precipitated by application for a building permit or is adopted solely to prevent development of a particular parcel of property, then the previously existing provisions are applicable. See, e.g., *Nott v. Wolff*, 18 Ill.2d 362, 163 N.E.2d 809 (1960). In the present case, however, there is no claim or evidence that the amendment was adopted to stop this particular development. In fact, the change in the zoning classification was part of a comprehensive review which had been undertaken by the county months before any application was filed by the Plaintiff and it actually liberalized the uses permitted on the subject property.

> The original complaint attacked the prior ordinance and does not pertain to the 1954 ordinance. *The prior ordinance is out of the case as superseded by the 1954 ordinance introduced into the case by the answer.* No reply was filed setting forth any facts which might tend to show that ordinance was unreasonable and void as applied to plaintiffs' property. The ground for the motion to strike the answer was that the 1954 ordinance was not applicable because it was not in effect at the time suit was filed. *Thus no facts were before the court upon which it could determine that the 1954 ordinance was unrelated to the public health, safety, comfort, morals and welfare.* For the reasons herein set out the decree is reversed and the cause remanded for further proceedings consistent with this opinion. 8 Ill.App.2d at 40; 130 N.E.2d at 288-289. (emphasis added)

Accord *Westerheide v. Obernueferman*, 3 Ill.App.3d 996, 279 N.E.2d 402 (1972); *O'Hare International Bank v. Zoning Board of Appeals*, 37 Ill.App.3d 1037, 347 N.E.2d 440 (1976).

Even the Plaintiff in this action conceded that the "law is clear that this case on appeal must be determined on the basis of the zoning ordinance as it presently exists. When the law has changed pending an appeal, the case must be disposed of by the reviewing court under the law as it then exists and not as it was when judgment was entered in the trial court." (Plaintiff's Appellate Brief at 40, and authorities cited therein.)

In light of such authority, the Petitioners believe that the Appellate Court committed error in basing its judgment on the provisions of a zoning ordinance no longer in effect. But when the Appellate Court's erroneous handling of the "mootness" issue was coupled

with the particular procedural posture of this controversy, even more serious constitutional issues were created. It is these constitutional issues which necessitate review by this Court and warrant granting this Petition for Writ of Certiorari.

As noted above, on January 19, 1976, the Cook County Board of Commissioners adopted a comprehensive amendment to the Cook County Zoning Ordinance changing the classification of the subject property from single-family residential to a new C-4 General Commercial District, subject to a special use, and the R-6 High-Density Residential District, subject to a special use. The accompanying county zoning map designates 14 acres of the 17-acre subject site for commercial use and the remaining 3 acres for multi-family residential, the exact division required for Plaintiff's proposed development. Before the Appellate Court, Plaintiff maintained these new classifications would allow its proposed development. The Petitioners agreed that the new classifications apparently permitted the Plaintiff's project, but there was some confusion on this point, the County arguing the ordinance does not really permit Plaintiff's project, and Plaintiff contending that the "special use" limitation on the new zoning is invalid. (Plaintiff's Appellate Brief at 68).

The important point here is that no evidence or testimony was ever presented to either the trial court or the Appellate Court regarding the effect or validity of the new ordinance. In other words, the Petitioners were never given an opportunity to challenge the new zoning classifications. At the outset of the trial, the County had opposed the proposed project. When the Plaintiff substantially changed its development plans in the course of the trial, and the trial court asked the County

Zoning Board whether these changes would in any way alter the County's opposition to the application, the answer was "no." No hearing was held by the County Zoning Board at this point to permit the Petitioners to introduce evidence against the revised plan. Yet barely six months after this latest denial, the County seemingly executed an about-face and enacted the new ordinance which appears to allow the shopping center development embodied in the revised plan, abandoning the interests of the Petitioners who have consistently maintained the best use of the subject property is for multi-family residential dwellings. Thus at every turn the Petitioners were precluded from introducing evidence and testimony regarding the new ordinance which all applicable authorities agree now governs the allowable use of Plaintiff's land. For this reason the Petitioners, immediately following the rezoning, filed a suit against Cook County, *Village of Northbrook v. County of Cook*, Law No. 76 L 1675 (Cir. Ct. Filed January 28, 1976), contesting the validity of the purported comprehensive amendment insofar as it purportedly reclassified the subject property to permit Plaintiff's proposed development.

Subsequent to the filing of the Petitioners' suit against the County, and in light of the comprehensive amendment to the County zoning ordinance, the Plaintiff filed a motion to dismiss the instant appeal on the ground of mootness. As Plaintiff argued throughout its appellate brief, the County has apparently eliminated any question relating to the former zoning ordinance which was the subject of the trial and this appeal by adopting the new zoning classifications, and therefore the case has been rendered moot. But the underlying dispute remains unresolved. The adoption of the new County zoning ordinance necessarily mooted the appeal of the trial court decision for the reason that the zoning ordinance which

was the subject of that appeal no longer existed to be validated or invalidated. That, however, did not resolve the issue of whether it was reasonable to zone and develop the subject property as proposed by Plaintiff. That is the issue now pending before the Cook County Circuit Court in *Northbrook v. Cook County*, Law No. 76 L 1675 (Cir. Ct. Filed January 28, 1976). The County's change of position with respect to the zoning of the subject parcel does not alter the rights of the Petitioners in this action and those rights should not be prejudiced because of the County's action. Only this Court can ensure that the rights of the Petitioners are not ignored and that they are accorded a fair and full hea. ing on the issues raised in *Northbrook v. Cook County, supra.*

Because the underlying issue has never been adjudicated, the trial and Appellate Court opinions must not be left standing to the Petitioners' prejudice. In *Brownlow v. Schwartz*, 261 U.S. 216 (1923), this Court recognized that where a case becomes moot on appeal, the proper course in a situation like this is to reverse the judgment below with directions to dismiss the complaint so that the Appellate Court decree, now moot, no longer stands. This same reasoning was applied in *LaSalle National Bank v. City of Chicago*, 3 Ill.2d 375, 121 N.E.2d 486 (1954), a case remarkably similar in procedural posture to the instant action. There the Illinois Supreme Court, relying on *Brownlow*, also held the appropriate remedy under such circumstances is to reverse the trial court judgment and to remand the case with directions that the complaint be dismissed. That case involved a challenge to provisions of the Chicago zoning ordinance. The plaintiff bank sought to compel issuance of a license for operation of a nursing home on its property. As in the instant action, a number of owners of property in the area in question intervened in

support of the City. The Circuit Court of Cook County held that the proposed use was permitted under the zoning ordinance and that certain neighbors consent provisions were invalid; the intervenors appealed the decision. In the meantime, the City of Chicago issued the license sought by the bank which then moved to dismiss the intervenors' appeal on the ground that it was moot.

Justice Schaefer, writing for a unanimous court, agreed that the case was moot, but held that the appropriate disposition under the circumstances was not to dismiss the appeal but to reverse and remand with directions to dismiss the complaint so that the intervenors would not be foreclosed from further action to protect their rights:

> Intervenors also contend that the appeal should not be dismissed even though the case is moot, because they would then remain bound by the adjudication of invalidity of the ordinances and by the declaration of the circuit court that they are entitled to no rights, without an opportunity for a review of those determinations. With this contention we agree. 3 Ill. 2d at 381; 121 N.E. at 489.
>
> See also, *Lehnhausen v. Downs*, 36 Ill.App.3d 940, 344 N.E.2d 762 (1976).

The reasoning approved by this Court and the Illinois Supreme Court in the two decisions discussed above applies to this case, and thus the Appellate Court's erroneous handling of the case and the Illinois Supreme Court's refusal to review the Appellate Court's action raise not only questions of basic fairness but also serious issues under the United States Constitution. If the Appellate Court judgment is allowed to stand, Plaintiff can be expected to argue that the judgment below is *res judicata* or collateral estoppel as to the underlying issues which are now pending in *Northbrook v. Cook County*,

Law No. 76 L 1675 (Cir. Ct. Filed January 28, 1976). Both the judgment of the trial court and the Appellate Court are extremely broad in their terms. The trial court specifically held invalid any classification more restrictive than one allowing the proposed development. But even more damaging to the Petitioners' rights in their pending suit against the County is the unsupported finding by the Appellate Court that the zoning classification of the subject property under the new 1976 County zoning ordinance "permit the uses proposed by the plaintiff." There is nothing in the record before the Appellate Court to support this conclusion, and in fact, the County claims the new classification does not permit a subregional shopping center on the site. Unfortunately, the Petitioners find little comfort in the County's protestations given the language of the Appellate Court.

The Appellate Court erred by insisting upon deciding a moot case. That error was compounded by that court's language respecting the type of development permitted on the subject property under the new County zoning ordinance and its affirmance of the extremely broad judgment of the trial court. The handling of this case by the courts of Illinois will prevent the Petitioners from having their day in court to challenge the validity of the new County zoning ordinance which, according to all relevant authority, governs the use of the subject property. This denial of an opportunity to challenge and be heard on the question of the validity of the new zoning ordinance offends the due process clause of the United States Constitution.

As stated in many decisions, the fundamental requirement of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews v. Eldridge*, 424 U.S. 319 (1976);

Armstrong v. Manzo, 380 U.S. 545, 552 (1965). This Court has made clear that the guarantee of due process extends to the judicial branch of state government:

> Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 682 (1930).

Yet in the instant action the Petitioners have been effectively denied the right to be heard as to the validity of the 1976 Cook County zoning ordinance by the Illinois courts. Here the Illinois courts have foreclosed the Petitioners from challenging the new zoning classification of the subject property; the Petitioners were never afforded an opportunity to introduce evidence or testimony relating to these new classifications. Without a shred of relevant evidence or testimony before it and despite the fact that the County took a differing view, the Appellate Court stated the new classifications permitted the proposed subregional shopping center. In proceeding in such a fashion, the Appellate Court violated Petitioners' constitutional rights to due process of law. The Appellate Court's attempt to decide the moot issue of the validity of the prior County zoning ordinance is equally tainted. From the Appellate Court's opinion, it is clear that the Court's view of the validity of the old ordinance was prejudiced by what it *assumed* the new ordinance permitted and yet Petitioners were never given a hearing on the intent, meaning, effect or validity of the new ordinance. Moreover, by refusing to review the action of the Appellate Court, the Illinois Supreme Court has placed its imprimatur on this deprivation of Petitioners' right to a full and fair hearing.

By the decision of this case, the Appellate Court has effectively closed the doors of the courts of Illinois to the Petitioners. This Court has recently considered effective access to the courts as an element of due process. In *Johnson v. Avery*, 393 U.S. 483 (1969), this Court held invalid a state prison rule that impeded prisoners attempting to assert *habeas corpus* claims, saying ". . . it is fundamental that access of prisoners to the courts for the purpose of asserting their complaints may not be denied or obstructed." *Id.* at 485. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the *Avery* holding was extended to prisoners' civil rights actions. This Court said:

> The right of access to the courts, upon which Avery was premised, is founded on the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. *Id.* at 579.

Here the state court's decision defeats and obstructs Petitioners' rights to a full and fair hearing on their challenge to the 1976 Cook County zoning ordinance just as effectively as the denial of legal assistance condemned in *Avery* and *Wolff*.

When, as here, a denial of due process prevents effective access to the courts, the result is a violation of the independent First Amendment right to petition the Government for a redress of grievances. This Court has expressly held that:

> Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed one aspect of the right of petition. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1963), this Court

held that a state may use *neither direct nor indirect* means to bar citizens "from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped." *Id.* at 7.

II.

PETITIONERS HAVE BEEN DENIED THE EQUAL PROTECTION OF THE LAWS BY THE DECISION OF THE ILLINOIS APPELLATE COURT WHICH HAS THE EFFECT OF DISCRIMINATING AGAINST PETITIONERS IN THEIR ATTEMPT TO CHALLENGE THE COOK COUNTY ZONING ORDINANCE.

Without any rational basis, the decision of the Illinois Appellate Court imposes disadvantages upon the Petitioners in their attempt to challenge the 1976 Cook County zoning ordinance as applied to the property involved in this action, disadvantages which would not be imposed upon similarly situated litigants challenging the same zoning ordinance. This discrimination constitutes a denial of equal protection as guaranteed by the Fourteenth Amendment.

As held in *Shelley v. Kraemer*, 334 U.S. 1 (1948), and numerous other decisions, judicial action in private disputes is a form of state action required for application of the Fourteenth Amendment. Moreover, "there can be no doubt that when individual rights are involved all must stand on an equal footing before a bar of justice." *Haley v. Troy*, 338 F.Supp. 794, 801 (D. Mass. 1972). The Petitioners here are asking no more than that they be treated even-handedly by the Illinois courts in their challenge to the 1976 Cook County zoning ordinance. The decision of the Illinois Appellate Court denies Petitioners such treatment. As stated in *United States v. First National Bank and Trust Co. of Lexington, Ky.*, 280 F.Supp. 260 (1967) *aff'd.* 391 U.S. 469 (1968):

> Equal justice under law means that any court action, civil or criminal, should be a satisfying experience to each litigant, that is, not that each would be satisfied with the results, *but that each would be satisfied that his rights had been clearly and objectively considered.* 280 F.Supp. at 263.

The Petitioners ask nothing more than to have their challenge to the 1976 Cook County zoning ordinance clearly and objectively considered. The disposition of the instant action by the Illinois courts effectively denies them that right.

CONCLUSION

For the foregoing reasons, we pray that the Petition be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

No. 62891

In The Appellate Court Of Illinois
First District, Fourth Division

NORTHBROOK TRUST & SAVINGS BANK,
Trustee under Trust No. LT-652,

Plaintiff-Appellee,

v.

COUNTY OF COOK,
a Body Politic and Corporate,

Defendant-Appellant.

Appeal from Circuit Court, Cook County.
Hon. **Edward F. Healy**, Presiding.

Mr. PRESIDING JUSTICE DIERINGER delivered the opinion of the court:

This litigation arose out of a complaint for declaratory judgment in which the plaintiff, Northbrook Trust & Savings Bank, sought a declaration that the Cook County zoning ordinance was unconstitutional as it pertained to the subject property. After a bench trial in the circuit court of Cook County, the court declared the zoning ordinance to be unconstitutional as applied to the subject property and held that the proposed use of a general service plan development was a reasonable use of the subject property.

The issues presented for review are (1) whether the plaintiff overcame the presumption of validity attaching to the zoning ordinance, (2) whether the trial court's

finding that the classifications of the zoning ordinance intervening between the existing R-3 and the proposed B-4 classification was unreasonable, (3) whether the trial court's restriction in cross-examination was reversible error, and (4) whether the plaintiff exhausted its administrative remedies.

The plaintiff is Northbrook Trust & Savings Bank as trustee for Ernest F. Schultz, Jr., Jens J. Jensen, and E.N. Maisel and Associates, developer of K-Mart Shopping Centers; the defendant is the County of Cook; and the intervenor-defendants are the Village of Northbrook, the Village of Glenview, the La Salceda Homeowners Association, and the American National Bank representing the residential developer of an adjoining parcel of land.

The subject property consists of 17.9 acres located in unincorporated Cook County, contiguous to the corporate limits of the Village of Northbrook. It lies northwest of the intersection of Willow Road and Shermer Road and fronts upon both Willow and Shermer except where separated from the intersection by an intervening parcel approximately 200 feet square which is used as a service station. At the time of trial, the subject property was in an R-3 single family residence district under the 1960 Cook County Zoning Ordinance and has been operated as a commercial nursery by the sellers of the property, Robert Gould and Pauline Gould, his wife. The Goulds sold the property for $1,172,000 contingent upon the rezoning of the subject property to permit the uses sought in this section.

The plaintiff applied for reclassification of the subject property to the B-4 General Service District with a special use of a planned development. After a hearing by the Zoning Board of Appeals, the Board of Commissioners denied the application. Immediately prior to trial, the plaintiff proposed a modified site plan. The

plaintiff's counsel contended the alterations were insubstantial and asked leave to file an amendment to the complaint to conform with the specifications of the revised site plan. The court entered an order providing that upon agreement of the parties the plaintiff would petition the Cook County Zoning Board of Appeals to obtain a determination as to whether the changes in plaintiff's plan would alter the Board's previous recommendation.

The Board found that there had been no substantial changes in the revised plan and stated that the change in plans would not alter their recommendation. The trial court then proceeded with the trial based upon the amendment to the complaint which contained the modifications to the site plan. The County of Cook and the intervenor-defendants objected and moved to dismiss the complaint for failure to exhaust administrative remedies, but the motion was denied.

Subsequent to the entry of the final judgment order in favor of the plaintiff in this action, the Board of Commissioners of Cook County adopted the comprehensive amendment to the Cook County Zoning Ordinance on January 19, 1976. Under the amendment, the subject property was reclassified to C-4, general commercial district, subject to a special use and to R-6, general residential district, subject to a special use. The zoning district lines correspond exactly to the areas set forth in the plans approved by the trial court and the classifications permit the uses proposed by the plaintiff.

On January 28, 1976, the Village of Northbrook filed a complaint in the circuit court of Cook County against the County of Cook contesting the validity of the comprehensive amendment insofar as it reclassified the subject property to permit plaintiff's proposed develop-

ment and a number of other commercial uses. Northbrook was thereafter joined in that action by the La Salceda Homeowners Association and the Village of Glenview.

On appeal some of the parties contend the questions in this case are moot because of the change in zoning and others dispute that contention, but we are determining the case on the merits.

Under the modified site plan, the plaintiff proposed to improve the subject property with a combination commerical and multiple-family development. Approximately 14.7 acres would be improved with 163,000 square feet of commercial building area and the westerly portion of the subject property consisting of 3.2 acres would be improved with one multiple-family building two and one-half stories tall consisting of 31 dwelling units. The principal tenants in the commercial area will be K-Mart, a supermarket, other retail operations, and either a bank or a restaurant.

It is proposed that the site will be buffered on the north and the west by a landscaped area 10 feet wide and by a stockade fence 5 feet high. The commercial development will include a parking lot for 910 automobiles and the multi-family portion of the proposed development will include parking for 62 cars. There will be three exits onto Willow Road from the development, one from the residential portion, and two from the shopping center. In addition, there will be one exit from the shopping center onto Shermer Road.

The subject property is bounded on the north by the La Salceda Del Norte residential development, an apartment complex of 4 multi-family structures zoned in the R-6 general residence district of Northbrook. The apartments rent from $240 to $440 per month.

The Villas Salceda, a 61-unit residential development zoned under the R-8 special development district of Northbrook, borders the subject property on the west. The villas, some of which directly abut the subject property, range in price from $79,500 to $96,250.

To the south the subject property borders on Willow Road, and to the south of Willow Road is a presently undeveloped 37-acre tract of land, classified in the R-3 single residence district under the county zoning ordinance.

The area to the east of the subject property across Shermer Road is classified M-1, restricted manufacturing district, except for the northeast corner of the intersection which is zoned B-2, and improved with a service station and a carwash. The M-1 area is improved with the United Parcel Service distribution center which also accommodates parking for many large truck trailers from 40 to 60 feet in length. North of the United Parcel Service facility is Borden-Wyler Foods, a manufacturing and processing plant. La Salceda Del Norte is directly across the street from United Parcel Service and Wyler Foods.

The southeast corner of Willow and Shermer Roads was classified for B-4 general service district under the Cook County Zoning Ordinance and improved with a service station, a restaurant, and a small shopping center known as the Will-Sher Center.

To the southwest of the subject property lies the La Salceda development consisting of 98 4-bedroom homes, the average price of which is $88,000.

Willow Road at this point is a major east-west artery, running from the Edens Expressway on the east to the Toll Road intersection, 2 miles to the west. It has a speed limit of 50 m.p.h. and is scheduled for widening in 1976 or 1977.

Thomas J. Buckley, a city planning and zoning consultant, testified for the plaintiff. He stated that the three corners of the Willow-Shermer intersection are all characterized by commercial development which is relatively recent, and the proposed use of the subject property was within his definition for the highest and best use of the subject site. He also testified the proposed plan was compatible with surrounding uses. Specifically, he noted the proposed 3.2-acre strip provided a buffer to the multiple-family constructions to the west and that the garages of the La Salceda Del Norte development to the north, with their wall backing to the subject property, provided a visual barrier between the two uses. He concluded that the proposed facility was needed in the area.

Buckley testified that the proposed use of the subject property would not have a detrimental effect on the surrounding land uses in the area, because the commercial character of the intersection had already been established. He said the subject property took its character not only from the gas station but also from the arterial roadway system and from the nature of the intersection being developed on the three corners with commercial establishments. He stated it would be virtually impossible to design a well-planned development under the present zoning.

William A. McCann, a real-estate appraiser and consultant and a member of the American Institute of Real Estate Appraisers, testified for the plaintiff. He stated he considered the location of the subject property as a prime commercial location, fronting on a major arterial road that had recently been improved to accommodate the increasing traffic in the area. He considered the location to be traffic oriented. He also stated the apartments to the north were primarily

oriented inward toward the man-made lake, which had been developed there. He considered the trend of the area to be toward commercial development at major intersections and, particularly, along the arterial roads. He stated there would be no adverse influences on the townhouses lying to the west of the subject property and to the apartment buildings lying to the north of the site, and the proposed use would not be depreciatory to surrounding property or be injurious to the health, welfare, and morals of the community.

McCann considered the intervening zoning classifications and concluded that the multiple-family classifications would remove a prime piece of commercial property from future development and would increase the density in the area which would augment the need and demand for additional commercial facilities. He also believed that, under the R-3 classification, the density permitted would not be economically feasible nor warranted by high density location of the subject property. If the subject property were zoned for something less than B-4, it was his opinion that the value of the property would be diminished by one half and that the subject property could not be profitably developed as zoned.

Paul Box, a consulting traffic engineer, testified for the plaintiff. He stated that a traffic signal would be needed at the Willow Road entranceway to the development, that new turning lanes would be required at both Willow and Shermer Roads, and that interconnected traffic signals should be installed, but that the proposed site plan would not create an undue traffic safety hazard. The site plan represented good, internal relations for parking and commercial vehicle access. John Bleck, a registered professional engineer and consulting engineer licensed in the State of Illinois, testified he had

prepared an engineer's feasibility plan for the subject property. He concluded that the available utilities were adequate to serve the subject site and there would be no adverse effect on any adjoining property owners.

David Hoffman of Red Seal Homes, the developer of the properties to the north and west of the subject property, testified for the defendants. On cross-examination, he stated that none of the villas in his development to the north would face the commercial proposal. He also stated that the view from those apartments include the United Parcel truck terminal, a service station, and a carwash.

Thompson Dyke testified for the defendants. He stated that the highest and best use of the subject property was a mixture of single-family, two-family and multiple-family units which depended upon private roads not on the subject property. He thought the proposal would have an adverse effect on the residential developments to the north and west and would have a speculative effect for more rezoning on the south side of Willow Road. Although he had previously indicated to the Northfield Township that five acres of the subject property should be used for neighborhood shopping, he now concluded that the development of two other nearby shopping centers had met the need in the area.

Dyke further testified that Willow Road was a major arterial roadway with heavy traffic and that heavy traffic militates against residential use. He stated that five acres of the subject site were suitable for commercial development, but his proposal for the highest and best use of the subject property was entirely residential. However, he did not consider any impact on schools or on utilities.

Lowell Martin, a resident of the La Salceda subdivision, testified he was the original president of the La Salceda Homeowners Association. He was of the opinion that the proposed development would deflate valuation of properties in the La Salceda development. He took into consideration lighting, pollution from additional traffic, cars parked in the lot, noise pollution, and dirt and paper. He did not believe there was a need for the proposed development on the subject site.

Leo G. Wilkie was called by the defendants as a traffic engineer. He testified that Willow Road was improved for the last time in 1969, and it is a high volume feeder between the Toll Road and Edens Expressway to the east. The proposed development would have an adverse effect on the intended purposes and functions of Willow Road by introducing another intersection. He concluded that a right-turn lane at Willow and Shermer could not be built to state standards, and that interconnecting the new signal at the shopping center with the existing Willow-Shermer signal would be counterproductive.

James Brown, a registered professional civil engineer, testified for the defendants. He was of the opinion that the subject site could not be adequately served with sewer or water and there would be an inadequate water supply to fight fires. He concluded that instead of a 3-acre foot storage facility for water on the subject property there should be a 4-acre foot storage facility. However, he conceded he had not read the testimony of John Bleck and there were alternative methods of providing an adequate water supply. He testified that the demand on sanitary sewage facilities under commercial use would be less than under multiple-family uses.

Ralph Martin, a real-estate appraiser, testified for the defendants. He stated that in his opinion the highest and

best use of the property would be for an R-8 development. He thought the proposed use would have a depreciatory effect both on the properties to the west and southwest and on the north. On cross-examination, he conceded that shopping in a residential area is considered an amenity and that the convenience of shopping could be an appreciation factor for residential homes.

Joseph Abel, a city planner, testified on behalf of the intervenor-defendants. He stated that the highest and best use of the subject property would be for a multiple-family planned development of the character existing to the north and west. It would fall primarily under the R-5 zoning classification of Cook County. However, in March 1973, Abel had testified before the County Zoning Board that the influence of the intersection of Shermer and Willow Roads called for a shopping facility of the neighborhood size of not more than 6 to 8 acres, and the remainder of the subject site should be used for some sort of multiple-family development.

There was varying testimony with respect to the valuation of the subject property under various zoning classifications. McCann testified the property was worth between $270,000 and $360,000 under the existing R-3 classification. He believed that if the property were rezoned in accordance with the contemplated use it would have a value of over $2,000,000. Under an R-4 classification, it would be worth approximately $360,000 to $450,000; under R-5, from $450,000 to $540,000; under an R-6, from $630,000 to $720,000. It was his opinion that the property could not be profitably developed with any of the intervening uses with the contract price at $1,200,000.

Ralph Martin testified that, under the R-3 single-family zoning, the fair-market value would be $400,000. Under the proposed use the fair value would be $1,200,000. If the property were used for a multiple-family planned unit development, it would have a value of $850,000.

Jens Jensen testified that the Red Seal Homes, the developer of the property to the west, had originally negotiated to purchase the western 3.2 acres for a price of $25,000 per acre for multi-family use. If that price were applied to the entire 17.9 acres, the parcel would be valued at almost $450,000.

The defendants contend the plaintiff did not overcome the presumption of validity which attaches to a zoning ordinance and which must be overcome by clear and convincing evidence. (*Bennett v. City of Chicago* (1962), 24 Ill. 2d 270; *Grobman v. City of Des Plaines* (1975), 59 Ill. 2d 588.) In the case of *County of Cook v. Priester* (1976), 62 Ill. 2d 357, the court set forth the standard for determining whether the presumption of validity of a zoning ordinance has been overcome:

> "The State's police power provides the sole justification for the enactment of zoning ordinances which limit a property owner's privilege and right to use his property as he desires. (Citations omitted.) Although a zoning ordinance is presumed valid, this presumption may be overcome by a property owner who shows by clear and convincing evidence that the ordinance as applied to him is arbitrary and unreasonable and bears no substantial relation to the public health, morals, safety or welfare. (Citations omitted.) Stated somewhat differently, the presumption of validity of an ordinance is overcome when it is shown that there is no reasonable basis requiring the restriction imposed and the gain to the public is small as compared to the hardship imposed on the property owner. (Citations omitted.)"

Even though this court may take judicial notice of the fact that the subject property now has been reclassified to the C-4, general commercial district, and the R-6, general residence district, by Cook County, after reviewing the record we conclude that the presumption of validity of the previous zoning ordinance has been overcome by clear and convincing evidence.

In the case of *La Salle National Bank v. County of Cook* (1957), 12 Ill. 2d 40, the court set forth the factors to be used in evaluating the validity of a zoning ordinance: (1) the existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which destruction of property values of plaintiff promotes the health, morals or general welfare of the public; (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property.

In this case, the intersection of Willow and Shermer Roads is characterized by commercial development. There are three gas stations and a small shopping center at the intersection and on the northwest corner there is an M-1 manufacturing district. Although the defendants argue that Shermer Road is the dividing line between commercial or manufacturing and residential uses, in the case of *Hutson v. County of Cook* (1974), 17 Ill. App. 3d 195, the court recognized the character of Willow Road and sanctioned the installation of a shopping center at the intersection of Willow and Pfingsten Roads to the west of the subject property.

At the subject site Willow Road is a major east-west artery and is scheduled for widening. Although the existence of heavily traveled streets will not necessarily render a zoning classification invalid, the commercial character of an intersection and the high volume of traffic must be taken into consideration. In the case of *Chicago Title & Trust Co. v. Village of Wilmette* (1963), 27 Ill. 2d 116, 124, the court stated:

> "* * * The tremendous volume of traffic at the intersection and the extensive commercial uses at two of its corners are factors which in themselves do much to cause the property to be unfit and undesirable for residence purposes and demonstrate the unreasonableness of the classification. Indeed, those building residence properties in the immediate area have taken great pains to orient and isolate their properties away from the traffic and commercial uses * * *."

It is also important to note the trend of uses in the last five years where there have been no single-family homes built on Willow Road which have direct access to Willow Road.

The evidence shows a significant discrepancy in value between the value of the property as currently zoned and as proposed. There was expert testimony by both the plaintiffs and the defendants that the property was worth between $270,000 and $400,000, as currently zoned, compared to the contract price of $1,172,000. There was no expert testimony either for the plaintiffs or the defendants that the property could be developed economically as zoned and none of the witnesses for any of the parties testified that the existing R-3 zoning was the highest and best use of the property. Although the property was used as a nursery and cannot be considered vacant, the fact that it remained undeveloped in the face of the trend toward residential development also suggests that the classification was arbitrary.

If the property were restricted in use to that permissible under the existing R-3 zoning, the result would be to significantly reduce the value of the property without any corresponding benefit to the health, morals and general welfare of the public. The testimony at trial was that the trend toward commercial developments at major intersections had already been established in the area, and the immediate intersection was already characterized by commercial and industrial uses. Both of plaintiff's experts testified the site was well-suited for the proposed use and one of defendants' experts had once recommended that a shopping center of 6 to 8 acres be placed there. Although a resident of the La Salceda subdivision testified that there would be a depreciatory effect on the value of the surrounding properties, it should be noted that the use of property cannot be restricted or limited merely because neighboring property owners so desire, or because they think it might protect the value of their residences. *Regner v. County of McHenry* (1956), 9 Ill. 2d 577; *Oak Park National Bank v. City of Chicago* (1973), 10 Ill. App. 3d 258; *Stalzer v. Village of Matteson* (1973), 14 Ill. App. 3d 891.

Although there was conflicting testimony with respect to whether the proposed development would have an adverse effect on the surrounding properties, such a conflict does not result in an irrebuttable presumption that the ordinance is valid. (*Stalzer v. Village of Matteson* (1973), 14 Ill. App. 3d 891, 902.) In the case of *Bauske v. Village of Des Plaines* (1957), 13 Ill. 2d 169, 181, the court stated:

> "Mere conflict in testimony as to the highest and best use of property, the impact of the proposed land use on the areas involved or its effect upon property values, does not make irrebuttable the

> presumption that an ordinance is valid. A difference of opinion does not render the evidence of one party unbelievable, or require a finding that the reasonableness of an ordinance is debatable. In a trial before the court without a jury, the credibility of witnesses and the weight to be accorded their testimony are still to be determined by the trier of fact. Unless manifestly against the weight of the evidence, his findings will not be disturbed."

After a review of the extensive record in this case, we conclude that the testimony of the plaintiff's experts that there would be little or no depreciatory effect on the surrounding property was supported by all the evidence. The intersection is already extensively commercial, the development to the west is buffered by the multi-family unit in the proposed development, and the property to the north which now overlooks the M-1 area to the east is buffered by the strip of landscaping and the stockade fence of the proposed development and by its own garages which abut the subject property.

The expert testimony with respect to the existence of engineering and traffic problems is also not persuasive. James Brown stated that there was an inadequate water supply for the proposed development, but he also testified he had not reviewed the testimony of the plaintiff's engineer and that there were alternative methods of providing water. It is also apparent that the plaintiff must meet the requirements of both the Metropolitan Sanitary District and the insurance underwriters before the development can be constructed. The testimony with respect to the existence of traffic problems was diametrically opposed, but that factor is not entitled to great weight. In the case of *Berger v. Village of Riverside* (1966), 69 Ill. App.2d 148, the court stated:

> "As the Supreme Court has said, 'While we have recognized traffic as a factor, it is not in itself entitled to too much weight since it is a problem in all but the most sheltered neighborhoods and is constantly getting worse.' *LaSalle Nat. Bank v. Village of Skokie*, 26 Ill. 2d 143, 146, 186 N.E.2d 46, 48 (1962)."

There was testimony from defendants' experts that the highest and best use of the property was multiple-family residential rather than commercial, and the defendants cite the case of *First National Bank of Lake Forest v. Village of Northbrook* (1971), 2 Ill. App.3d 1082, for the proposition that the plaintiffs have the burden of showing not only that the present zoning is unreasonable but that all intermediate zoning classifications are also unreasonable. However, the weight of the authority is against such a proposition. *First National Bank of Skokie v. Village of Morton Grove* (1973), 12 Ill. App.3d 589; *Stalzer v. Village of Matteson* (1973), 14 Ill. App.3d 891; *Aurora National Bank v. City of Aurora* (1976), 41 Ill. App.3d 239.

The intervenor-defendants contend the court committed reversible error by restricting their cross-examination of plaintiff's witnesses to the assistant State's Attorney pursuant to the guidelines set forth in the case of *Hutson v. County of Cook* (1974), 17 Ill. App. 3d 195. In the case the same trial judge similarly limited cross-examination to the State's Attorney and directed that all questions were to be submitted to and asked by him. On review this court stated:

> "The right of a trial court to control the course of litigation to insure a fair trial for all parties and to avoid undue delay is unquestionable. * * *
> The [trial] court emphasized that counsel for the intervenors could put on their own witnesses and conduct their own cases * * *.

> The procedure of the court was a reasonable exercise of its discretion in the interest of serving the ends of justice. The defendants failed to point out where they were precluded from having a question asked on cross-examination. Moreover, it is quite clear that restrictions on cross-examination will not be grounds for reversal when all the evidence is before the trial court and the appellate court."

Similarly, in this case the court stated that all parties could put on their own witnesses and have an opportunity to submit questions to the State's Attorney for additional cross-examination. The defendants have failed to point out any example of prejudice they have suffered.

The La Salceda Homeowners Association, Inc. appeals separately on the issue of exhaustion of administrative remedies. The Association contends that the Zoning Board of Appeals had no authority to make a determination that changes in the site plan submitted prior to trial were insubstantial and would not require a reapplication as to its new site plan, and, consequently, the plaintiff failed to exhaust its administrative remedies.

The rule requiring the exhaustion of administrative remedies before challenging the constitutionality of a zoning ordinance established in *Bright v. City of Evanston* (1956), 10 Ill. 2d 178, is not applied where the demonstrated attitude of the local authorities makes it clear that administrative relief or further efforts to obtain it will not be forthcoming. (*Bass v. City of Joliet* (1973), 10 Ill. App. 3d 860; *The County of Lake v. McNeal* (1962), 24 Ill. 2d 253; *Van Laten v. City of Chicago* (1963), 28 Ill. 2d 157.) In *Bass* the court held that the fact that the site plan introduced in evidence was not precisely the same as the plan presented to the Commission was not grounds for holding that no

exhaustion had taken place. The court relied on the fact that the issue presented to and decided by the local authorities was precisely the same issue raised in the judicial proceeding; whether the plaintiffs' property should be changed from one classification to another and permitted to be used for a specified use.

In *Sulzberger v. County of Peoria* (1963), 29 Ill. 2d 532, the court held that exhaustion had taken place even though the site plan had been changed. The court stated:

> "[N]o useful purpose would be served by requiring reconsideration solely because of minor variations in the physical facts where the fundamental question remains unchanged. (*Wiercioch v. Village of Niles*, 27 Ill. 2d 363.) To do so would defeat one of the purposes of the *Bright* doctrine, (*Bright v. City of Evanston*, 10 Ill. 2d 178) which was to prevent delay in the administration of justice. *Van Laten v. City of Chicago*, 28 Ill. 2d 157."

In *McNeal*, the court stated:

> "To compel a property owner to first seek local relief in the face of the demonstrated attitude of the local authority, would be a patently useless step which would increase costs, promote circuity of action and delay the administration of justice."

In this case the defendants have not shown how they have been prejudiced or how a delay in the administration of justice has taken place.

For these reasons the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

LINN and JOHNSON, JJ., concur.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

Present The Honorable Henry W. Dieringer Presiding Judge.
Present The Honorable David Linn Judge.
Present The Honorable Philip Romiti Judge.
Gilbert S. Marchman Clerk. Richard J. Elrod Sheriff.

Northbrook Trust and Savings Bank, Trustee under Trust No. LT-652,
Plaintiff-Appellee
No. 62891 vs.
County of Cook, a body politic and corporate,
Defendant-Appellant
The Village of Northbrook, et al.,
Intervenor-Defendant-Appellants
American National Bank & Trust Company of Chicago, etc., et al.,
Intervenor-Defendant-Additional Appellants
LaSalceda Homeowners Association, Inc., an Illinois not-for-profit corporation,
Intervenor-Defendant-Additional Appellant

Appeal from the Circuit Court of Cook County
(No. 74-L-1510)

Appellants Petition for Rehearing is Denied.

Entered: May 5th, 1977

CERTIFICATE

I certify that this is a copy of the order of the Appellate Court, First District.

May 25th, 1977

/s/ Gilbert S. Marchman
Clerk of Court

APPENDIX C

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

CLELL L. WOODS
CLERK

TELEPHONE
AREA CODE 217
782-2035

September 30, 1977

Mr. Frederic O. Floberg
Attorney at Law
Ross, Hardies, O'Keefe,
Babcock & Parsons
One IBM Plaza - Suite 3100
Chicago, Illinois 60611

No. 49620 - Northbrook Trust and Savings Bank, Trustee, etc., respondent, vs. County of Cook, a body politic and corporate (The Village of Northbrook, a municipal corporation, et al., etc., petitioners). Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

Date entered:
September 30, 1977

APPENDIX D

In The Circuit Court of Cook County, Illinois
County Department—Law Division

No. 74 L 1510

NORTHBROOK TRUST AND SAVINGS BANK, TRUSTEE UNDER TRUST NO. LT-652,

Plaintiff,

v.

COUNTY OF COOK, a body politic and corporate, et al.,

Defendants.

FINAL JUDGMENT ORDER

This cause coming on to be heard on an amended complaint of the plaintiff for declaratory judgment, and the Court having heard and considered all evidence adduced, both oral and documentary, and having heard and considered the arguments of counsel, and being fully advised in the premises, finds:

1. That the Court has jurisdiction of the parties hereto and the subject matter hereof.

2. That an actual controversy exists between the parties hereto and the parties hereto are entitled to a declaration of their rights with respect to said controversy pursuant to the provisions of Section 57.1 of the Illinois Civil Practice Act.

3. That the plaintiff, NORTHBROOK TRUST AND SAVINGS BANK, Trustee Under Trust No. LT-652, is the owner of the following described real estate in the County of Cook and State of Illinois:

The Northeast 1/4 of the Northeast 1/4 (except the North 636 feet thereof) and (except also the West 200 feet of the East 231.50 feet of the North 200 feet of the South 250 feet of the Northeast 1/4 of the Northeast 1/4) of Section 21, Township 42 North, Range 12 East of the Third Principal Meridian, and (except also that part taken by the state, Described as follows: Beginning at the Southeast corner of the Northeast 1/4 of the Northeast 1/4 aforesaid; thence North on the East line tnereof to the South line of the North 636 feet aforesaid; thence West, on said South line 39.60 feet; thence South, to a point 80 feet North of and 30.17 feet West of the place of beginning (as measured on the East line of said Northeast 1/4 and on a line at right angles thereto); thence Southwesterly to a point on the West line of the East 33 feet of said Section, said point being 27.12 feet North of the Intersection of said West line with the North line of the South 50 feet of the Northeast 1/4 of the Northeast 1/4 aforesaid; thence South, on said West line, to the South line of the Northeast 1-4 of the Northeast 1/4 aforesaid, thence East on said South line to the place of beginning) and (except also the South 50 feet of the Northeast 1/4 of the Northeast 1/4 of said Section 21, Township 42 North, Range 12 East of the Third Principal Meridian) in Cook County, Illinois.

4. That the above-described property is located at the northwest corner of Willow Road and Shermer Road and is located approximately 200 feet West and North of the intersection, in Northfield Township in the unincorporated area of Cook County and consists of approximately 17.9 acres. That the premises were, at the time of the commencement of this action, zoned R-3 Single Family Residence District under the Zoning Ordinance of the County of Cook.

5. That the defendant herein is the County of Cook, a body politic and corporate. That the intervenor-defendants herein are the Village of Northbrook, a municipal corporation, Village of Glenview, a municipal corporation, American National Bank and Trust Company of Chicago, not individually, but as trustee under Trust Agreement dated April 11, 1972, and known as Trust No. 76642; and American National Bank and Trust Company of Chicago, not individually, but as trustee under Trust Agreement dated December 18, 1967, and known as Trust No. 25933; and LaSalceda Homeowners Association, Inc., an Illinois not for profit corporation.

6. That the issues in this cause are with the plaintiff and against the defendant and intervenor-defendants.

7. That the plaintiff proposes a commercial development of 14.7 acres and 3.2 acres of multi-family development consisting of approximately 163,000 square feet of commercial building area and 31 multi-family dwelling units. Said development to be substantially in accordance with plans presented as evidence in this proceeding.

8. That the proposed development is not permitted on the subject property under the terms of the R-3 Single Family Residence District classification, as set forth in the Cook County Zoning Ordinance. That the plaintiff herein applied for re-classification of the subject property from the R-3 Single Family Residence District, its present zoning, to B-4 General Service District, with a Special Use for a Planned Development, to permit the construction of the proposal as hereinabove described. That said application for rezoning and planned development was denied by the Board of Commissioners of Cook County. The plaintiffs therefore have exhausted all local and administrative remedies available to them.

9. That the highest and best use of the subject property is for the general service planned development of the type and character proposed to be erected by the plaintiff as hereinabove described.

10. That the Zoning Ordinance of the County of Cook as applied to the subject property, insofar as it prevents the use of the subject property for a general service planned development, is unreasonable, arbitrary, confiscatory, unconstitutional and void and bears no reasonable relationship to the public health, safety, morals and welfare.

11. That the proposed use of a general service planned development, providing for approximately 163,000 square feet commercial building area and 31 dwelling units, as indicated on the plans submitted to this Court, is a reasonable use of the subject property and may be permitted.

12. That the application of the provisions of the Cook County Zoning Ordinance contained in the R-3, R-4, R-5, R-6 and B-1, B-2 and B-3 Districts would be unreasonable, arbitrary, confiscatory, unconstitutional and void.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

A. That the Cook County Zoning Ordinance, insofar as it prevents the use of the plaintiffs' property for a general service planned development, providing for approximately 163,000 sq. ft. commercial building area and 31 multi-family dwelling units, all as shown in exhibits presented to this Court, is void, invalid and of no effect as applied to the subject property.

B. That the plaintiffs, or any person claiming by, through or under them, are entitled to use the subject property for a general service planned development in

substantial compliance with the plans submitted in evidence in this cause.

C. That the County of Cook, and its agents, servants and employees and each and every one of them, and the intervenor-defendants, their agents, servants and employees and each and every one of them, be and they are hereby enjoined from enforcing the provisions of the Zoning Ordinance of the County of Cook insofar as said ordinance prevents the use of the subject property as aforesaid, and further the County of Cook is directed to issue to the plaintiffs or their successors in title, upon proper application and upon compliance with all applicable codes and all necessary permits and licenses for the erection of a general service planned development in the manner herein provided, and that they be further enjoined from interfering with the plaintiffs and all persons claiming by, through and under them, from utilizing the subject property as hereinabove decreed to be their right.

D. That judgment be and it is hereby entered in favor of the plaintiffs and against the defendant and the intervenor-defendants, in accordance with the prayer of the complaint.

E. That this Court shall retain jurisdiction of this cause for the purpose of enforcing the terms of this decree.

F. That this is a final order and no just reason exists for the delay of an appeal, if any.

ENTER:

/s/ Judge Healy

_____, 1975.

APPENDIX E

Constitutional Provisions Involved

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS.

This case involves an appeal by the County of Cook and certain intervenors from the decision rendered by the Circuit Court of Cook County declaring invalid the Zoning Ordinance of Cook County insofar as the ordinance classified the subject property as R-3 Single-Family Residence District. The subject property is located at the northwest corner of Willow Road and Shermer Road, approximately 200 feet west and north of the intersection in Northfield Township in the unincorporated area of Cook County and consists of approximately 17.9 acres.

At the time of the commencement of the action, the property was zoned R-3 Single-Family Residence District under the Zoning Ordinance of the County of Cook. The plaintiff proposes a commercial development of 14.7 acres and 3.2 acres of multi-family development.

In the final declaratory judgment order entered on August 15, 1975, the Court held that the Zoning Ordinance was invalid insofar as it prevented the use of said property as proposed by the plaintiff. The County of Cook and the intervenors filed a notice of appeal on August 15, 1975.

Subsequently, pursuant to hearings conducted before the Zoning Board of Appeals of Cook County, the Board of Commissioners of Cook County did on January 19, 1976 adopt a Comprehensive Amendment to the Zoning Ordinance of Cook County, including map amendments relating to the unincorporated area of Northfield

Township. As a result of the Comprehensive Amendment, the subject property of this lawsuit was rezoned to the C-4 General Commercial District subject to a special use and to the R-6 General Residence District subject to a special use. That the zoning district lines correspond exactly to the areas set forth in the plans approved by the trial court for commercial and multiple-family development on the subject property.

That by virtue of the rezoning, as aforesaid, the subject property is now correctly zoned to permit the uses sought by the plaintiff in this action. That as a result of said rezoning by the County of Cook, the issues in this cause are now moot for the reason that the uses sought by the plaintiff in the trial court and approved by the trial court are now permitted under the zoning classification approved by the Board of Commissioners of Cook County.

At the same time as the adoption of the Comprehensive Amendment to the Zoning Ordinance, the Board of Commissioners of Cook County adopted a Comprehensive Plan for the unincorporated areas of Cook County, including Northfield Township. Said Comprehensive Plan includes a land use plan which, among other parcels, covers the subject property of this lawsuit. Said Comprehensive Plan shows the use of the subject property to be for commercial purposes and multiple-family purposes in the areas sought for such use by the plaintiff in this action.

That by virtue of the rezoning by the County Commissioners of Cook County, the issues in this cause are now moot. Therefore, nothing remains for this Honorable Court to pass upon. This Court of course can take judicial notice of the adoption of the amendatory zoning ordinance of Cook County on January 19, 1976,

which reclassifies the subject property as aforesaid. The reversal of the trial court in this case would have no effect on the use of the subject property for the reason that the County of Cook, which purports to be an appellant in this case, has by action of its legislative body granted the zoning requested in the first instance by the plaintiff in this case.

We therefore respectfully request that this Honorable Court dismiss this appeal on grounds of mootness.

NORTHBROOK TRUST AND SAVINGS BANK,
Trustee under Trust No. LT-652,
plaintiff-appellee

By_____
Its Attorneys

THEODORE NOVAK
30 North LaSalle Street
Chicago, Illinois 60602

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263-2968

APPENDIX G

MEMORANDUM IN SUPPORT OF OBJECTIONS TO PLAINTIFF'S MOTION TO DISMISS AND IN SUPPORT OF INTERVENORS-DEFENDANTS' CROSS-MOTION TO REVERSE AND REMAND

This action involves an appeal by the County of Cook and certain Intervenors, the objectors herein, from a decision rendered by the Circuit Court of Cook County, Judge Edward F. Healy presiding, declaring invalid the 1960 Zoning Ordinance of Cook County to the extent that such ordinance classified the subject property in the R-3 Single-Family Residence District and prevented construction of Plaintiff-Appellee's proposed development.

The subject property is an L-shaped 17.9 acre tract of land located adjacent to the Village of Northbrook in unincorporated Cook County at the northwest corner of Willow Road and Shermer Road. It is also contiguous to the La Salceda residential subdivision in the Village of Northbrook. The Plaintiff proposed a commercial shopping center development of 14.7 acres and 3.2 acres of multi-family development, uses not permitted under the R-3 Single-Family District classification.

In the final declaratory judgment order entered on August 15, 1975, the trial court ruled in favor of Plaintiff, finding that the R-3 Single-Family Residence District of the 1960 Zoning Ordinance was invalid as applied to the subject property and that the highest and

best use of the subject property was for the aforesaid development proposed by Plaintiff. The trial court further found that all of the intervening zoning classifications of the 1960 Cook County Zoning Ordinance between the R-3 Single-Family zone and the B-4 commercial district zone, which would allow Plaintiff's proposed development, were also invalid. The County of Cook and the aforesaid Intervenors filed a notice of appeal from this decision on August 15, 1975.

Subsequently, the Board of Commissioners of Cook County purportedly adopted on January 19, 1976, a Comprehensive Amendment to the Zoning Ordinance of Cook County, including Map Amendments relating to the area encompassing the subject property. As a result of the purported Comprehensive Amendment, the subject property was rezoned to the C-4 General Commercial District subject to a special use and to the R-6 General Residence District subject to a special use, classifications which Plaintiff now asserts permit its proposed development to proceed.

Immediately following the adoption of this purported Comprehensive Amendment to the Cook County Zoning Ordinance, the Village of Northbrook brought suit in the Circuit Court of Cook County against the County of Cook (No. 76 L 1675) contesting the validity of this purported Comprehensive Amendment insofar as it purportedly reclassified the subject property to permit Plaintiff's proposed development.* A copy of that complaint is attached.

* Intervenors-Defendants-Appellants Village of Glenview and La Salceda Homeowners Association are presently preparing to intervene as plaintiffs in, or to bring an independent action essentially similar to, this suit against the County of Cook. Affidavits of Zachary Ford, attorney for the Village of Glenview, and Harvey Schwartz, attorney for La Salceda Homeowners Association, to that effect are attached.

The Plaintiff now moves to dismiss this appeal contending the issues have become moot by reason of the adoption of a new County zoning ordinance. The Intervenors do not dispute the contention that this appeal is moot. The underlying dispute, however, remains unresolved. The adoption of the new county zoning ordinance necessarily moots this appeal for the reason that the zoning ordinance which is the subject of this appeal no longer exists to be validated or invalidated. That, however, does not resolve the issue of whether it is reasonable to zone and develop the subject property as proposed by Plaintiff. That is the issue now pending before the Circuit Court in *Northbrook v. Cook County* (No. 76 L 1675). Simply because the County has now changed its position with respect to the proper zoning of the subject tract, the rights of the Intervenors in this action have not been altered and should not be prejudiced because of the County's action. This Court must ensure that the rights of the Intervenors are not ignored.

Because the underlying issue is not yet finally adjudicated, the Intervenors object to the Plaintiff's motion *to dismiss* this appeal. The Illinois Supreme Court, relying on United States Supreme Court authority, has held the appropriate remedy under such circumstances is *to reverse* the trial court judgment and to remand the case with directions that the complaint be dismissed.

LaSalle National Bank v. City of Chicago, 3 Ill.2d 375, 121, N.E.2d 486 (1954), is a case remarkably similar in procedural posture to the instant action. There the Court held that while the appeal was moot, the proper course under circumstances like those present here was not to

dismiss the appeal but to reverse and remand with directions to dismiss the complaint:

> Intervenors also contend that the appeal should not be dismissed even though the case is moot, because they would then remain bound by the adjudication of invalidity of the ordinances and by the declaration of the circuit court that they are entitled to no rights, without an opportunity for a review of those determinations. With this contention we agree. In most of the cases where the issues have become moot, the appeals were dismissed. The practice has not, however, been uniform; judgments and decrees have been affirmed; (*People v. Sweitzer*, 321 Ill. 380; *Wick v. Chicago Telephone Co.* 277 Ill. 338; *Wendell v. City of Peoria*, 274 Ill. 613;) judgments and decrees have been reversed, (*People v. Redlich*, 402 Ill. 270;) and there have been reversals and remandments. *Ebert v. Beedy*, 113 Ill. 316 . . .
>
> In our opinion, appropriate disposition of this cause requires that the judgment of the circuit, which cannot be reviewed because intervening events have made the case moot, be set aside. Such a disposition makes it clear that the matter will not be *res judicata*, since there is no judgment on the merits. The judgment order of the circuit court of Cook County is therefore reversed and the cause remanded, with directions to dismiss the complaint. 3 Ill.2d at 381-382.
>
> See also, *Brownlow v. Schwartz*, 261 U.S. 216.

Any other disposition would raise not only questions of basic fairness but also serious issues under both the United States and the Illinois Constitutions. If this appeal is simply dismissed, Plaintiff can be expected to argue that the judgment below is *res judicata* or collateral estoppel as to the underlying issues which are now pending in *Northbrook v. Cook County* (No. 76 L 1675).

Acceptance of that position would result in the Intervenors being bound by the trial court's adjudication herein without an opportunity for appellate review. As stated above, that adjudication is extremely broad in its terms, the trial court having specifically found invalid the R-3 Single-Family Residence classification and all other classifications more restrictive than one allowing the proposed development. Furthermore, the trial court found that the highest and best use of the subject property was for the aforesaid development. Such findings go to the heart of the Intervenors' pending suit against the County of Cook challenging the purported Comprehensive Amendment to the Cook County Zoning Ordinance, a suit explicitly premised on a claim that the use of the property as proposed by the Plaintiffs and allowed by the 1976 Cook County Zoning Ordinance is unreasonable. There has yet been no final adjudication of that claim and, in disposing of this moot appeal, this Court should do nothing which might be construed as prejudicing the right of the Intervenors to secure such a final adjudication.

It must be remembered that the underlying issues involved here are, as in most zoning litigation, constitutional issues. In addition, questions of constitutional due process are present. If this Court should fail to protect the rights of the parties herein to a full adjudication of their claims, basic federal and state constitutional issues would arise.

The United States Supreme Court has frequently recognized the obligation of the courts of the various states to provide an effective forum for the protection of federal rights. Mr. Justice Frankfurter summarized much of this law for the Court in *Angel v. Bullington*, 330 U.S. 183, 188 (1947):

> "Speaking for a unanimous court, Mr. Justice Brandeis thus expressed the subordination to the requirements of the Constitution of the power of a state to withdraw jurisdiction from its courts: 'The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution.' . . . This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' "

Of particular relevance to this case are several decisions of the United States Supreme Court indicating that state concepts of "mootness" cannot justify closing state courts to federal claims or denying basic justice and due process to litigants.

Liner v. Jafco, Inc., 375 U.S. 301 (1964), involved the question of whether a federal claim could be defeated under state law rules concerning mootness. In that case, the Court held that when a plaintiff is asserting federal rights in a state court,

> ". . . the question of mootness is itself a question of federal law upon which we must pronounce final judgment." Id. at 304.

The Court went on to hold that the appeal there had not been mooted since "the federal issues remain of operative importance to the parties . . . ." Id. at 306.

In the instant case, the federal issues originally raised remain unresolved and of unquestioned importance to the parties. These same issues are pending before the Circuit Court in *Northbrook v. Cook County* (No. 76 L

1675). To deprive the intervenors of an opportunity for a final adjudication of those issues would violate their right to due process under the United States Constitution. To avoid such a result, this Court should, as directed by *LaSalle National Bank v. Chicago, supra*, reverse and remand with directions to dismiss the complaint.

Respectfully submitted,

VILLAGE OF NORTHBROOK,

BY:_____
ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS

LA SALCEDA HOMEOWNERS ASSOCIATION, INC.

BY:_____
HARVEY SCHWARTZ

VILLAGE OF GLENVIEW,

BY:_____
ZACHARY FORD

APPENDIX H

DEFENDANT'S OBJECTIONS TO PLAINTIFF-APPELLEE'S MOTION TO DISMISS AND DEFENDANT-INTERVENOR-APPELLANTS' CROSS-MOTION TO REVERSE AND REMAND.

Now comes the Defendant-Appellant, COUNTY OF COOK, a body politic and corporate, by its attorney, BERNARD CAREY, State's Attorney of Cook County, and objects to the Motion to Dismiss, heretofore filed by Plaintiff-Appellee and to the Cross-Motion to Reverse and Remand, heretofore filed by Defendant-Intervenor-Appellees, and respectfully prays that said motions be denied.

In support of said objections, the COUNTY OF COOK, says as follows:

Plaintiff-Appellee's Motion to Dismiss, and Defendant-Intervenor-Appellants' Cross-Motion to Reverse and Remand, are both premised upon an incorrect factual assumption: i.e., that the Comprehensive Amendment to the Zoning Ordinance of Cook County, adopted on January 19, 1976, allows the property owner to proceed with the development of the proposed use which is the subject of the instant appeal.

The proposed use has been adequately described in the preceding memoranda filed with this Court. What has been inadequately delineated is the description of the commercial portion of that use. Plaintiff-appellee, for instance, has simply stated that the proposed use calls for a "commercial development of 14.7 acres." Inter-

venor-Defendant-Appellants have characterized the proposed commercial use as "commercial shopping center development of 14.7 acres." Expert testimony elicited at the trial of this case characterized the proposed commercial use as a "sub-regional shopping center." It was pursuant to that characterization that the initial lawsuit was filed, prepared, tried, and appealed.

As the attached letter from Alex R. Seith, (Chairman of the Cook County Zoning Board of Appeals) to Theodore J. Novak (one of the attorneys for Plaintiff-Appellee), indicates, the COUNTY OF COOK, through the enactment of the 1976 Comprehensive Amendment to the County Zoning Ordinance never intended that such enactment be interpreted as an approval of the proposed plan of developing the property as a "sub-regional shopping center." Indeed, that precise use was rejected on two previous occasions by the Zoning Board of Appeals.

As the Seith letter further indicates, the designation C-4, S.U. for a portion of the proprty was intended solely to permit the property owner to present to the Zoning Board, plans consistent with both the C-4, S.U. designation and the concept of a "neighborhood shopping center." A hearing to allow the property owner to present such plans was scheduled for May 7, 1976, but was continued, at the request of the property owner.

Contrary to the positions of the Plaintiff-Appellee and the Intervenor-Defendant-Appellants, it is clear that the COUNTY OF COOK has not, in any manner, acted to allow the proposed use. Contrary to their assertions, the issues presented by this Appeal have not become moot. Indeed, the proper method to consider Cook County's continued objection to the proposed use is to proceed fully with the instant appeal.

WHEREFORE, the COUNTY OF COOK, a body politic and corporate, respectfully prays that Plaintiff-Appellee's Motion to Dismiss and Intervenor-Defendant-Appellants' Motion to Reverse and Remand be denied.

BERNARD CAREY
State's Attorney of Cook County

By:_____

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443-8777